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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

Nos. 73-29 and 73-695

CORNING GLASS WORKS, A CORPORATION,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETER J. BRENNAN, SECRETARY OF LABOR,
Petitioner,

vs.

CORNING GLASS WORKS, A CORPORATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THIRD CIRCUITS.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

INTEREST OF THE AMICUS.

The interest of the Chamber of Commerce is set forth in the previously filed "Brief on Behalf of the Chamber of Com-

merce of the United States of America, as *Amicus Curiae*, in Support of the Petition for Writ of Certiorari" in Case No. 73-29. Pursuant to Rule 42 of this Court, consents from all parties have been obtained for the Chamber's participation as *amicus curiae*.

SUMMARY OF ARGUMENT.

This case presents the Court for the first time with the question of the manner by which compliance with the Equal Pay Act of 1963 can be achieved. The import of the decision below, in Case No. 73-29, is best understood in the factual context out of which this case arose.

Prior to June 1, 1966, at its Corning, New York facilities, Corning paid employees working as night shift inspectors at a higher rate than it paid day shift inspectors, and only men worked as night shift inspectors. After June 1, 1966, although the pay rate differential between the night and day shift jobs was maintained, the two jobs were made equally available to employees of each sex and sexual integration of the jobs was substantially achieved. Both male and female day shift inspectors received the same day shift rate. Night shift inspectors, both male and female, received the same higher night shift rate. Effective January 20, 1969, as a direct result of collective bargaining negotiations, the pay rate on the two jobs was equalized at a new rate higher than the rate previously existing for either job and an additional wage rate premium, based solely upon seniority (a "red circle" rate), was granted to every person employed on or prior to the date of the Agreement, male or female, who at any time thereafter worked as a night shift inspector.

Viewing this factual pattern, the Second Circuit, in Case No. 73-29, held that the day and night shift jobs were "equal", that Corning's sexual integration of the night shift job did not cure its prior violation, and that the "red circle" rate further perpetuated the violation.[1] According to the Second Circuit's

1. The Second Circuit, Case No. 73-29, and the Third Circuit, Case No. 73-695, disagree on the threshhold issue of whether day work and night work are performed under similar working

interpretation of the Act, compliance can only be achieved by equalizing the wage rates for both jobs at the higher night rate —in this case the higher night shift contained in the 1966 collective bargaining agreement. This interpretation is contrary to both the philosophical precepts and literal reach of the Act. It imposes liability on an employer whose current practices are in accord with the mandate of the Act,—based solely on a past practice which is no longer operative or effective,—and discourages voluntary compliance.

It is submitted that the Second Circuit's view should be rejected, and that this Court should conclude that compliance with the Act is achieved by action which makes the higher paying job equally available to members of either sex and which pays all employees performing that job at an equal rate of pay.

I.

COMPLIANCE WITH THE ACT IS ACCOMPLISHED BY OPENING UP THE HIGHER PAYING JOBS ON A NON-DISCRIMINATORY BASIS: NOTWITHSTANDING A FINDING OF PRIOR VIOLATIVE CONDUCT, DISSIMILAR WAGE RATES APPLIED NON-DISCRIMINATORILY BETWEEN THE SEXES DOES NOT RESULT IN A CONTINUING VIOLATION OF THE ACT.

The Court below held that past sexual discrimination between equal jobs may be presently remedied *only* by raising the rate of the lower paying jobs to that of the higher, rather than to

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conditions and are thus "equal" within the meaning of the Act. The Third Circuit, *Brennan* v. *Corning Glass Works*, 480 F. 2d 1254 (CA 3, 1973), examined both the substantially identical factual pattern arising at Corning's Wellsboro, Pennsylvania location and the legislative history of the Act, and concluded in agreement with Corning, that the time of day is a working condition within the meaning of the Act. Accordingly, the Third Circuit held that Corning had not violated the Act. As a result, the court found no need to consider whether Corning's action in sexually integrating the night shift job constituted compliance. The Chamber agrees with the reasoning and conclusion of the Third Circuit with respect to this threshhold issue. However, because of the significance that the question concerning the means of compliance has for all employers subject to the Act and for industry generally, the Chamber confines its remarks herein to that issue.

make effectively available to both sexes the equal opportunity to work both jobs. The Court's holding fails to comport with the unambiguous language of the Act, results from a mistaken interpretation of the legislative history, and results in a legal anomoly which is contrary to the sound policy of encouraging voluntary compliance and could not have been intended by Congress.

A. Corning's Affirmative Action Complies With Both the Literal Mandate and the Spirit of the Statute; the Second Circuit Has Erroneously Rewritten the Act.

The Act provides only that "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages—at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . ."[2]

On June 1, 1966, Corning voluntarily made the higher paying night shift inspection jobs equally available to members of either sex on a non-discriminatory basis, and paid *any* employee holding such job at the *same* rate as all other employees performing that job. After that date, there were

2. Section 6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U. S. C. Sec. 206(d)(1). Section 6(d)(1) provides in full:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

no distinctions in the wage rate paid to either sex.[3] Thus, the statutory basis for the finding of a violation was eliminated and Corning was in compliance with both the literal mandate and spirit of the Act.[4]

However, the Second Circuit held that Corning's affirmative and total elimination of any sexual basis regarding pay rates on the night inspection job did not achieve compliance with the Act. The Court relied for this holding principally on its reading of certain legislative history in interpreting what is called the "reduction proviso" of the Act. That proviso states:

> [A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U. S. C. Sec. 206(d)(1).

The action instituted by Corning in June 1966 does not fall within the ambit of the reduction proviso, for that action did not operate to reduce the wages of any employee in order to comply with the provisions of the Act, but rather, was a successful affirmative effort to make the better paying night shift inspection job equally available on a non-discriminatory basis to employees of each sex.[5] However, the Second Circuit interprets the proviso language "shall not reduce" to mean "shall increase the wage

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3. These findings were made by the District Court. See, 319 F. Supp. 1161 (W. D. N. Y., 1970) at 1166, 1168.

4. This is true because there was then no longer any sexual discrimination on the night shift inspector jobs. Such jobs were equally available at the same rates regardless of sex, and, as found by both the District Court, 319 F. Supp. 1161, at 1166, and the Court of Appeals, 474 F. 2d 226, at 230, a number of women took advantage of this opportunity, and over half of the vacancies occurring in night inspection jobs were taken by women. Similarly, after June 1, 1966, the day shift inspection jobs were equally available to both sexes, and the pay for those jobs, though less than the pay for night shift, was uniform for all day shift inspectors.

5. There is no finding by any of the Courts below that any employee suffered a wage reduction as a result of Corning's action. Obviously, no wage reduction could occur as a result of Corning's action.

rate of the lower rated job"[6] and, therefore, construes the Act to require that in every case of a prior violation, present compliance with the Act can only be achieved by increasing the lower rated job to the level of the higher.[7] The court's reliance on legislative history is misplaced when it is interpreted, as the court does, to alter or rewrite the clear meaning of the language specifically set forth in a statute.[8]

Further, the legislative history does not support the interpretation given the proviso by the court below. Rather, that history reveals that Congress' *only* concern was to rule out the possibility that compliance with the Act might be accomplished by reduction in the rate of the higher rated job. Thus, for example, in the House, Representative Thompson explained that "The lower wage rate must be increased to the higher level *so that there will not be an adverse effect on already established wage patterns.*"[9] In the Senate, that section of the Report ex-

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6. 474 F. 2d at 235.

7. The legislative history relied upon by the Second Circuit in support of its interpretation are statements of Representative Griffin in *Hearings on H. R. 3861 and Related Bills Before the Special Subcommittee on Education and Labor*, 88th Cong., 1st Sess. 65 (1963) and H. R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963) 109 Cong. Rec. 2909. See, 474 F. 2d at 234-5. While it is true that the authority relied upon by the Second Circuit contains statements that the lower rate should be increased, those statements, standing alone, do not support the court's interpretation of the proviso. The purpose of the proviso was fully explicated on the floor of the House and in the Senate Report, see remarks for Congressman Thompson and S. Rep. No. 176, *infra*. Read together, the statements relied on by the Second Circuit and those of Congressman Thompson and the Senate Report reveal a consistency of intent—to prevent the incongruous result that compliance with the Act would be achieved by lowering existing wage rates. Compliance achieved by opening up the higher paying jobs to women does not have such a result. See, discussion *infra*.

8. *U. S.* v. *Oregon*, 366 U. S. 643 (1961) 659; *U. S.* v. *Missouri Pacific R. Co.*, 278 U. S. 269 (1928) 278, wherein this Court firmly established the principle that isolated statements of legislators and legislative history should not be used to support a construction contrary to the clear language of the statute.

9. 109 Cong. Rec. 9196 (1963).

plaining the proviso declared that its specific purpose was to assure that no "individual's present economic status should be adversely affected by the enactment of this legislation."[10] This intention is reflected in the unambiguous language of the proviso. Corning's actions clearly did not run afoul of the evil Congress sought to prohibit by the proviso because that action, while successfully making the higher paying job available to both sexes on a non-discriminatory basis, was not accomplished by a reduction in wage rates and caused no employee to suffer adverse economic consequences.

Simply, the Second Circuit has erroneously and unjustifiably expanded the "reduction proviso" to prohibit all but a single means of achieving compliance with the Act.[11]

Moreover, as a result of its persuasion to expand the reach of the proviso beyond the intent of Congress, the Second Circuit failed to consider specific statements of Congressional purpose contrary to the court's interpretation and corroborative of the position taken by Corning. For example, Congressman Frelinghuysen stated:

> "Nothing in this bill prohibits discrimination in pay strictly between women or strictly between men. *Discrimination*

10. S. Rep. No. 176, 88th Cong., 1st Sess., 109 Cong. Rec. 8915 (1963).

11. The Court below has relied essentially upon three cases to support its interpretation: *Schultz* v. *American Can Co.—Dixie Products*, 424 F. 2d 356 (CA 8, 1970); *Hodgson* v. *Square D. Co.*, 459 F. 2d 805 (CA 6, 1972) *cert. denied*, 409 U. S. 967 (1972); and *Hodgson* v. *Miller Brewing Co.*, 457 F. 2d 221 (CA 7, 1972). The *bona fides* of Corning's program of sexual job integration distinguishes these cases from the instant preceding. *Square D* and *American Can* involved situations in which the higher rated jobs had been opened to women but the women were effectively precluded from being able to work those jobs. Here, however, the courts below specifically found that sexual integration of the night inspection job had been substantial. In *Miller Brewing*, the Court found that the Employer, through a complex system of transferring employees, had arrived at the same result as if it had equalized the pay rate initially by lowering the wages of male employees. In the instant case, as found by the courts below, no employee suffered a wage reduction as a result of Corning's method of achieving compliance.

that operates against both men and women is not prohibited. The only thing prohibited is a difference in pay that is based on sex."[12]

Congressman Goodell, sponsor of the Equal Pay Act, speaking to the issue directly involved here, stated: "Differences in pay between groups or categories of employees that contain both men and women within the category are not covered by this Act."[13] Corning made all jobs on both shifts equally available to all who applied, irrespective of sex, and paid the uniform rates set for each shift, again, irrespective of sex. Corning, by its own affirmative action, eliminated the statutorily prohibited discrimination. For the Second Circuit to insist now,—as a current means for redressing a voluntarily discontinued practice which sexually restricted the night shift job—that *non*-sexual distinctions, of whatever kind for whatever purpose, may not be maintained, is unsupported by the Congressional purpose.[14]

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12. 109 Cong. Rec. 9196 (1963) (Emphasis added).

13. 109 Cong. Rec. 9209 (1963). As pointed out by the Third Circuit in Case No. 73-695 below, this Court accords great weight to a sponsor's views in attempting to extract the legislative purpose. 480 F. 2d 1254, 1260 (CA 3, 1973). See, e.g., *National Woodwork Mfgs. Assn.* v. *N. L. R. B.*, 386 U. S. 612 (1967); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); *Pan American World Airways Inc.* v. *C. A. B.*, 380 F. 2d 770 (CA 2, 1967) *aff'd.*, 391 U. S. 461 (1968). Mr. Goodell's remarks clearly support the position that after June 1, 1966, Corning was in compliance with the Act.

14. The lower court's construction of the remedial requirements of the Equal Pay Act conflicts in principle with approach taken by the courts in remedying sex and race discrimination under Title VII of the Civil Rights Act of 1964 (78 Stat. 253, as amended, 42 U. S. C. Sec. 2000 (e) *et seq*. The concept of past violations tainting present conduct is a theory rooted in cases arising under Title VII. In such cases, the remedy is to order the employer to do just what Corning did in 1966, i.e, permit the members of the alleged class of discriminatees to take the better paying and more desirable jobs as vacancies occur. See, e.g., *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (CA 5, 1971), *cert. denied*, 406 U. S. 906 (1972); *United States* v. *Bethlehem Steel Corporation*, 446 F. 2d 652 (CA 2, 1971). The Chamber perceives no basis in the

B. The Lower Court's Decision Is Contrary to the Sound Policy of Encouraging Voluntary Compliance With Federal Law.

The lower court's decision is based on the theory that a specifically eliminated, non-currently operative past practice is a sufficient basis upon which to predicate the finding of a present violation of the Act. Under this construction, current compliance with the literal mandate of the Act could never be attained by sexual job integration if the rates of pay on the compared jobs were not also equalized. As a consequence of having to equalize the wage rate between the jobs being compared, an inequity in the rate relationships between those jobs and all others would result. Since all jobs are rated and some jobs, because of required skill, training, and experience, are rated higher than others, the employer could not equitably raise the rate on jobs requiring less skill, experience and training to a higher level without raising the rate of all jobs an equivalent amount. His failure to do so would cause justified employee dissatisfaction. The employer, in order to correct this inequity, might be required to readjust its entire wage structure at a cost which would be competitively prohibitive.

In addition to the adverse effect on employers who would predictably suffer from the competitively disadvantageous position in which the lower court's construction would place them. the employees, too, would be disadvantaged from so far reaching a remedy. In an industry's marketplace, no employer can be foreclosed from options available to others without uniform cost both to them and their employees' security. A representative circumstance may serve to illustrate. Assume an employer has two jobs which are "equal" within the meaning of the Act. Job A pays $100 per week and Job B pays $200 per week.

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legislative history of the Equal Pay Act for the application of a different and more harsh remedy under that statute than if the same factual situation were attacked under the sex discrimination prohibitions of Title VII.

At some time in the past, the employer employed only women in Job A and only men in Job B. Under the holding of the Second Circuit, no matter how successfully this employer has altered his present employment practices to allow both men and women to be employed in the higher paying Job B, the only appropriate remedy is to compel both the lower rated Job A as well as Job B to be paid at the same rate of $200 per week.

However, assuming another employer elects to enter the industry for the first time, therefore without any past history of sexually discriminatory conduct, and has the identical jobs (A and B) but employs men and women to occupy each job, then that employer is in compliance with the Act although he is lawfully permitted to pay employees performing Job A at the rate of $100 per week and employees performing Job B at the rate of $200 per week. Since the two employers are in direct competition, the economically disadvantageous position in which the former is necessarily placed can only insure that adverse consequences will accrue both to him and his employees. The ultimate result of forcing him to absorb such artificially imposed increases in labor costs may well be the loss of his business or, at minimum, a reduction in the number of available jobs. The frequency with which this situation is likely to arise under the equal pay laws renders this a most serious problem for industry. There may frequently occur instances in which statutorily "equal" jobs contain different wage rates for reasons that have nothing to do with sexual discrimination.[15] That an employer may, in the past, have restricted access to the higher paying job on the basis of sex should not result in a prohibition without future limit against differentiation between jobs on a basis other than sex.

Yet that unfortunate and unnecessary result is compelled by the Second Circuit's construction of the Act. It will inevitably

15. An employer may, for example, realize greater profits in one department than another, though the jobs performed are "equal," and he may desire to pass those profits on to his employees on a wholly non-discriminatory basis within each department. Nothing in the statute prohibits his doing so.

lead to serious business difficulties for numerous affected employers required to make severely uncompetitive and illogical adjustments to "remedy" voluntarily discontinued conduct. Such a result could not have been Congressionally intended. Indeed, a statutory construction which leads to such a result is in conflict with the established principle of this Court to avoid such idiosyncratic construction of federal legislation. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381 (1939).[16]

Such a purpose is not reflected either in the legislative history or the statutory language. It substantially subverts the efforts of employers such as Corning to voluntarily comply with the Act by tainting their otherwise valid and successful compliance efforts, should there ever be a finding of prior violation.[17] In general, voluntary compliance is discouraged if

16. Although not raised below, the Second Circuit's construction could very well render the Act unconstitutional. The due process clause of the Fifth Amendment requires that Acts of Congress operate equally on all persons in like circumstances and not operate as a partial law affecting the rights of or imposing burdens on a particular individual or class in a way in which the rights of other persons, similarly situated, are not affected or burdened, unless the restraint or imposition has some rational basis germane to the substantive purposes of the legislation. See, for example, *Schneider* v. *Rusk*, 377 U. S. 163 (1964); *Shapiro* v. *Thompson*, 394 U. S. 618 1969; *United States Department of Agriculture* v. *Murray*, ... U. S. ...., 93 S. Ct. 2832 (1973). Here, the Second Circuit would impose upon an employer whose current non-discriminatory practices are the same as other employers, a burden not imposed on those others because of a prior practice that has been totally eliminated. The elimination of the prior practice is the object of the Act. The disparate treatment of employers whose current practices place them in like circumstances with other employers who are in compliance with the Act has no rational relationship to legitimate goals of the Equal Pay Act. The Second Circuit's interpretation thus appears to operate as a denial of due process, a result Congress could not have intended.

17. The remedy fashioned by the Second Circuit thus renders the Act punitive rather than remedial. This can only discourage successful voluntary compliance contrary to the judicially approved view that appropriate remedies should be fashioned to encourage successful voluntary efforts to rectify existing statutorily violative conditions. See, e.g., *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (CA 8, 1968).

compliance involves such extraordinary, unbusinesslike and uncompetitive conduct as that compelled by the Second Circuit. Such unfortunate results should be rejected by this Court; they could not, on rational analysis, have been intended by Congress.

II.

THE GRANTING OF AN INCREASED RATE OF PAY BASED SOLELY UPON SENIORITY TO ALL EMPLOYEES OF EACH SEX EMPLOYED IN A GIVEN JOB SHOULD NOT BE CONSIDERED A VIOLATION OF THE ACT EVEN WHERE THERE HAS BEEN A FINDING OF PRIOR DISCRIMINATORY PRACTICE.

Effective January 20, 1969, and as a direct result of collective bargaining negotiations between Corning and the Union representing the employees here affected, a job evaluation plan was instituted under which the disputed jobs, and all other jobs at the Corning, New York location, were rated. Pursuant to that plan, the existing wage rate differential between day shift inspectors and night shift inspectors was abolished. A new wage rate, higher than either of the former rates, was established. However, in order to reach agreement, Corning and the Union provided, in the collective bargaining agreement, that *all* employees who were employed prior to the effective date of the agreement would henceforth receive additional compensation when working as night shift inspectors. This additional compensation or "red circle" rate was based solely on seniority and applied to both *men and women* since the affected jobs were then fully sexually integrated.[18]

The Second Circuit conceded that had Corning done no more than institute the job evaluation plan, which fairly rated the disputed jobs, there would have been no claim of continued

18. Such "red circling" is not uncommon in collective bargaining agreements. Increased pay, benefits and job protection, based on seniority, is one of Labor's main goals in negotiations. As a result, "red circling" of senior employees is often a necessary method of giving effect to the Union's seniority demands and a basis for reaching agreement.

violation. However, the Court below found that the "red circle" rate perpetuated the prior violative conduct,[19] and held that Corning could only cure its continuing "violation" by raising its admittedly fair and non-discriminatory evaluated rate to the "red circle" rate.

The Second Circuit's conclusion is in contravention of both the literal wording of the Act which permits differentials based on seniority, and the express intent of Congress that the Act should not interfere with and restrict the collective bargaining process in the establishment of non-sexually discriminatory wage rates. The Court's holding disregards the fact that the sole eligibility criteria necessary for the attainment of the "red circle" rate was employment as of the date of the execution of the 1969 agreement. The sex of any otherwise eligible employee has no impact upon whether or not such employee is paid the "red circle" rate. In the instant context, where night shift inspectors work is equally available to members of each sex and any employee in the plant, regardless of sex, is paid the "red circle" rate if such employee has the necessary seniority, neither an overt nor an insidious sexual discrimination is properly inferrable.[20] Since "seniority" is a statutorily specified permissible basis for a wage rate differential, the effect of permitting a judicial holding predicated upon such an inference would be to eliminate this specific statutory defense in all instances where an employer at some prior time had engaged in violative conduct.[21]

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19. 474 F. 2d 226, 235.

20. Since the eligibility date for entitlement to the "red circle" rate was January 20, 1969 and *all* employees—male and female alike—employed on that date thus automatically became eligible for the "red circle" rate, the "red circle" rate could not possibly have perpetuated any past discrimination based on sex.

21. Moreover, H. R. Rep. No. 309, *supra*, 109 Cong. Rec. 2909 (1963) 2910 specifically acknowledges that "red circle" rates are exempt from the coverage of the Act:

> "It [exemption No. iv—a differential based on any other factor other than sex—] also recognizes certain special circumstances,

Further, since the basis of the "red circle" rate was seniority and not sex, the Second Circuit's holding would require Corning to abrogate non-discriminatory wage rates arrived at in a fair and freely negotiated collective bargaining agreement. Such action is not only not required by the Act but is contrary to the intent of Congress to preserve, consistent with the Act, the national policy of giving full play to the process of collective bargaining. In this regard, Representative Goodell, the sponsor of the Act, stated, in an exchange during the House debates, that:

> "[W]e want the private enterprise system, employer and employees and a union, if there is a union, and the employers and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.
>
> "Mr. Griffin: So long as pay differentials are not based on sex.
>
> "Mr. Goodell. Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction." 109 Cong. Rec. 9198 (1963).

The result reached by the Second Circuit is not justified either under the literal wording of the Act or any reasonable interpretation of the legislative history.

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such as 'red circle rates.' This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons."

Here the reason was purely seniority, a reason expressly made valid by the specific language of the Act.

CONCLUSION.

For the reasons stated herein, together with those additionally urged by Corning, the Petitioner in Case No. 73-29, the Court is respectfully urged to reverse the Second Circuit with respect to the question of the manner by which compliance with the Act may be achieved.

Respectfully submitted,

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